APPEAL NO. 93454

On April 29, 1993, a contested case hearing was held in (city), Texas, with (hearing offier) presiding. The issues determined at the contested case hearing were whether claimant had sustained a new injury on (date of injury), in the course and scope of his employment with General Dynamics (employer), and whether he had given timely notice of such injury to his employer, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01 (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the claimant had sustained an injury to his back, and had given timely notice of that injury to his supervisor on that same day. The hearing officer ordered that temporary income benefits be paid in accordance with her decision.

The carrier has appealed arguing that the evidence was insufficient to prove that claimant's back condition was not as a result of a preexisting condition, rather than either a new injury or aggravation. The carrier further asserts that the supervisor's testimony clearly establishes that claimant did not report an injury on the job. The carrier points out that only claimant's testimony supports either issue, and, as such, the great weight and preponderance of the evidence is against the hearing officer's decision. The claimant responds that the decision should be affirmed, that the supervisor's testimony admitted that he could not remember conversations with the claimant, and that the bulk of the evidence supports the decision.

DECISION

After reviewing the record, we affirm the hearing officer's decision, modifying it only to make clear that carrier is liable for medical benefits for the injury as well.

The claimant forthrightly stated that he had injured his back in 1989, had been off work from 1990 until January 2, 1992, and had received a settlement for that accident in October 1991. The settlement included two years of open medical treatment restricted to (Dr. W). The claimant stated, and medical records in evidence support, that when he returned to the employer, he was restricted from lifting over 40 pounds, and from sitting in excess of 30 minutes.

The claimant stated that his doctors who treated the 1989 injury, (Dr. A) and Dr. W, told him he needed surgery, but that he elected not to pursue surgery because he was concerned about it. He noted that he had physical therapy, had improved, and was ready to return to work December 1991. A letter dated December 30, 1991 by Dr. A to the employer records a diagnosis of "low back syndrome." The narrative indicates that claimant had normal nerve function, and that x-rays revealed unilateral spondylolysis with spina bifida. After describing restrictions, this letter concluded by stating "[a]t present, no other treatment is necessary."

In cross examination, claimant stated that, although he had been told that he had herniated discs, he believed it was Dr. W, and not Dr. A, who told him this. No records from

Dr. W were put into evidence.

Claimant stated that he was returned to work in the crew area of aircraft, the job he held at the time of his 1989 injury, because that is all the employer had. While this task did not entail lifting over 40 pounds, it did require sitting in excess of 30 minutes. As a result, he experienced discomfort for which he sought treatment by the "plant hospital" several times. The log of the plant hospital documents visits on April 24, 28, May 5, 29, and July 29, 1992, prior to the claimant's date of injury. Some of the visits relate to time missed from work. Claimant was not taken off work by the plant doctor for any of these visits. Reference is made in the log to absences taken due to pain and discomfort. The records indicate that claimant has two herniated discs.

Claimant stated that he was assigned to work in inventory, which involved listing parts contained in long boxes. These boxes, he stated, had to be lifted off pallets and onto tables. In the course of lifting a box on the morning of (date of injury), he felt a pull and sharp pain in back and legs. He stated it was like the pain he felt during his 1989 injury, going beyond the discomfort he had been feeling from sitting. He stated that supervisory permission was required to go to the plant hospital, and he reported to his supervisor, (Mr. P), what had happened and was given permission to go. He went, and was recommended for either restricted work or off work, according to the records of the hospital, by Dr. J. Claimant said that he told Dr. Judson about the box lifting incident.

Claimant went to see Dr. A the following Monday, after the plant hospital arranged the appointment. Dr. A ordered an MRI examination, which was given the next day. A week later, claimant stated that he met with Dr. A for about five minutes, and that Dr. A looked at the MRI and pronounced he needed surgery, and did not remain long enough to discuss alternatives with him. Claimant still did not want surgery because he did not want to be off work for the six months he understood it would take to recover. He thereafter sought a second opinion from (Dr. S) after getting a referral from his Health Maintenance Organization doctor, (Dr. L). Claimant said that Dr. S opted for conservative treatment before surgery and sent him to Fort Worth Back Institute, which he has paid for himself, with the assistance of his parents.

Claimant stated his last day of work was (date of injury). He said that he went back by the employer's location and picked up his paycheck from Mr. P, and at that time discussed the matter with him, including the fact that he would be having an MRI. The claimant, throughout his testimony, steadfastly maintained that he discussed the box lifting incident with Mr. P, the medical people at the plant hospital, and perhaps another supervisor for the employer. On or about October 1, 1992, claimant received a mailgram from employer seeking clarification of his medical status. He stated that he responded by calling the plant hospital and reporting to Linda McHale, a nurse. This contact is documented in the log of the plant hospital, which notes that claimant has an upcoming appointment with

Dr. Stark for a second opinion on a surgery recommendation by Dr. A.

Mr. P testified on direct that, to his recollection, claimant had not asked for permission to go to the plant hospital relating to a back injury. He acknowledged that permission of a supervisor would be required to go during work hours. Mr. P stated that if claimant did go, he went after work, which would be after 3:45 p.m. Thereafter, the hearing officer pointed out to Mr. P that the hospital log indicated that claimant visited at 12:20, which Mr. P confirmed would be 12:20 p.m. Upon recross examination, Mr. P's recollection was apparently somewhat more refreshed; he stated the hospital would have provided a "green slip" for restrictions, and he would have to look in claimant's file to see if one were there. He further stated "[i]f he did ask me to go to the plant hospital, it was just to go check some records."

Mr. P testified that the plant hospital would ordinarily notify the plant safety office regarding a work-related injury. Mr. P stated that his first knowledge of a back injury on September 11th came through the plant safety office, but the date is not indicated in the record. Mr. P stated that after claimant had been away from work for five days, he reported the absence to LR, which he identified as the division in charge of investigating absence. He confirmed that within three weeks of September 11th, he had a conversation with LH in this division, and that Ms. Hicks stated she had been in contact with Dr. J the plant doctor, and was aware of claimant's MRI.

Mr. P confirmed that he gave claimant his paycheck within two weeks of his last day of work and that they discussed the MRI that claimant was to have; however, he testified that he did not inquire about the cause or reason of the MRI (notwithstanding that he was claimant's supervisor and had, by that time, reported unexcused absences to Labor Relations), although he knew that an MRI was a scan to determine the cause of back problems. Mr. P steadfastly maintained that claimant never told him he had reinjured his back lifting boxes. Mr. P stated that relations between him and the claimant had not gone well in the past, due to a whistle-blower incident, which he characterized as significant, involving the claimant.

Carrier put into evidence, for unrestricted use, a letter written by claimant to the employer after he was terminated. This letter was written October 12, 1992, and details several contacts that claimant had with Texas Rehabilitation Commission (TRC). Claimant also testified (as set out in the letter) that the contact was initially made by TRC (on September 16th, according to the letter). The letter states that the contact person at TRC told claimant they were referred by his employer.

The report of claimant's MRI examination conducted September 16, 1992 indicates degenerative changes at L4-5 with a moderate herniation, and degenerative changes at L1-2 with mild diffuse posterior protrusion, and hypoplasia of the facet joint on the right at L5-

S1. A CT scan is suggested for further analysis of the condition at this level. A note by Dr. S indicated that he examined claimant on October 5, 1992, noted claimant's preexisting back problems, and documented that claimant had a flare-up after a lifting injury about two weeks previously.

EVIDENCE OF INJURY

There is sufficient evidence to support that claimant sustained injury on (date of injury). A claimant's testimony alone is sufficient to establish that an injury has occurred. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). As we have stated many times, an aggravation of a preexisting condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). A carrier that wishes to assert that a preexisting condition is the sole cause of an incapacity has the burden of proving this. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Article 8308-6.34(e). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Here, not only is there the testimony of the claimant, there is corroboration by way of the note of the plant hospital that an aggravation occurred, because claimant was recommended to be off work for the first time in all of his visits to the plant in 1992. Further, carrier plainly failed to carry its burden to prove sole cause. Although claimant testified that Dr. W may have told him he had a herniated disc, the only medical record from a treating doctor which is in evidence is Dr. A's December 1991 letter, which does not mention herniated discs and in fact records recovery from the effects of claimant's previous condition, imposing two restrictions. Claimant's reinjury apparently resulted when such restrictions were not followed. However, negligence is no bar to recovery under the Texas Workers' Compensation Act. Article 8308-3.01(a).

WHETHER THERE WAS TIMELY NOTICE

There is sufficient evidence from which the hearing officer could conclude that claimant notified Mr. P on September 11th, as he stated he did. Charged with weighing the credibility of witnesses, Article 8308-6.34(e), she evidently found claimant's testimony more

persuasive than that of Mr. P.

Although the hearing officer found that notice was given on September 11th to Mr. P, we observe the record contains a veritable cafeteria selection of evidence that would have supported notice being given to Mr. P when he discussed claimant's MRI, or actual notice by the employer well within thirty days, which under Article 8308-5.01(a) would obviate the need for notice by the claimant altogether.

The Labor Relations Division of the employer, charged with investigating absences, had, according to Mr. P, knowledge of the medical reasons underlying claimant's absence within three weeks after September 11th. Employer's plant doctors and nurses treated or consulted with claimant for the September 11th injury not once, but twice, a situation affirmed by the Texas Supreme Court as demonstrating actual knowledge of injury by the employer in DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). As the court noted in that case, the purpose of notice is to give the insurer the opportunity to investigate promptly the facts surrounding an injury. Id, at p. 532. The employee need not give the specific time, place and extent, but the employer need only know the general nature of the injury and the fact that it is job related. Id, at p. 533.

In short, we find that the determination of the hearing officer sufficiently supported on both issues by the record, and we affirm. However, we are concerned that her decision could be read as limiting claimant's recovery only to temporary income benefits. We wish to make clear that her decision should not be so read, and that claimant, as a result of his compensable injury, will also be entitled to medical benefits as set forth in Article 8308-4.61. Her decision is modified by us only by adding this sentence to the Decision section: "The carrier is also liable for medical benefits in accordance with the Texas Workers' Compensation Act, Article 8083-4.61."

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge